No. 2937.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

PACIFIC COAST PIPE COMPANY, a Corporation,

Appellant,

vs.

CONRAD CITY WATER COMPANY, a Corporation, PONDERA VALLEY STATE BANK, a Corporation, CONRAD BANKING COMPANY, a Corporation, CONRAD TRUST & SAVINGS BANK, a Corporation, CONRAD MERCANTILE COMPANY, a Corporation, JAMES T. STANFORD, Receiver, and PARIS B. BARTLEY, Trustee,

Appellees.

BRIEF FOR APPELLANT.

E. C. DAY,
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of Counsel.

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BRIEF FOR APPELLANT

This is an appeal from a decree of the District Court of the United States for the District of Montana, dismissing the Appellant's bill of complaint for want of jurisdiction. (Tr. p. 48).

On May 14, 1915, Appellant filed in the District

Court of the United States, for the District of Montana, its bill of complaint against the Appellees to enforce a judgment obtained by it against the Appellee, the Conrad City Water Company, on the 2nd day of July, 1914, in an action against the Water Company in said District Court, in which a writ of attachment had been issued on November 3, 1913, and levied upon the real estate of the Water Company on November 7, 1913, by filing a copy of the writ with the County Clerk and Recorder of the County in which the real estate was situated, as provided by the Statutes of Montana. The bill of complaint (Tr. pp. 2-16), after setting forth the jurisdictional facts, the issuance of the writ of attachment, its levy and the recovery of the judgment, details the organization of the Conrad City Water Company by one Ben Hager, George H. Stanton and M. S. Darling. It then alleges that at the meeting of the incorporators, a resolution was passed accepting the offer of Hager to sell to the Company the entire water works system theretofore constructed by him, including franchises granted by the Town of Conrad, in exchange for the delivery to him of 99,980 shares of the capital stock of the Company, and $70,000 in a note secured by an issue of bonds of the Company of the par value of $80,000. That the shares of stock and bonds were issued and delivered to Hager, who thereupon turned them over to one W. G. Conrad, to be sold and out of the proceeds to pay the debts of the Company, without any exceptions. It is alleged that at the date of these

transactions, August 26, 1910, the Company was not indebted to either Hager or Conrad in any some whatever, nor had either of them made any advances to the Company in excess of the sum of $51,000, which sum had been advanced by W. G. Conrad through the medium of Conrad Brothers, a partnership, the Pondera Valley State Bank, and the Conrad Townsite Company, which firm and corporations were controlled by the said W. G. Conrad. That on the 18th day of April, 1911, there was a meeting of the directors, at which a resolution was passed providing for the execution by the Water Company of notes to Conrad Brothers for the sum of $48,275, the Conrad Townsite Company $13,930, Pondera Valley State Bank $5,419, and W. G. Conrad $850, which notes represented the moneys advanced for the construction of the plant already represented by the notes delivered to Hager, and pretended to be secured by the deed of trust and bonds theretofore executed. That after the recovery of the judgment by the plaintiff, the Appellant herein, the officers of the Conrad City Water Company, turned the affairs of the Water Company over to the management of the officers in charge of the different companies hereinabove referred to, and that by means of suits to foreclose a mechanics lien of $54.70, they had obtained possession of all of the property of the Company, through the appointment of the defendant James T. Stanford as Receiver. That by some means, to the plaintiff unknown, the bonds had come into the possession of

the defendant Paris B. Bartley, as Trustee, who was asserting some interest under and by virtue of the Trust Deed. That after the recovery of the judgment referred to in the complaint, and on the..... day of March, 1915, the Conrad Mercantile Company commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, against the Conrad City Water Company, to foreclose a pretended mechanics lien for the sum of $54.70, for supplies and materials furnished to the Water Company between the 1st day of September, 1914, and the 10th day of March, 1915. That in addition to the prayer for the foreclosure of the lien, there was a prayer for the appointment of a receiver upon the ground that the Conrad City Water Company was insolvent and its affairs in a chaotic condition, and that in order to protect the plaintiff from great loss and to enable the Company to supply the inhabitants of Conrad with water, it was necessary that a receiver be appointed to take charge of the assets of the Water Company. That upon the same day that the complaint was filed the Conrad City Water Company appeared and confessed the allegations of the complaint, and thereupon the Judge of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, appointed the defendant James T. Stanford, receiver of the real and personal property of the Water Company, who immediately took possession of all of the property and held the same under his

control by virtue of his appointment as receiver. That the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton had no jurisdiction to appoint the receiver for the reason that the complaint in the action did not set forth facts sufficient to confer upon the court jurisdiction, and that the receivership was a part and parcel of the scheme entered into by the defendant Stanford and other officers of the Conrad City Water Company, with the intent to hinder and delay the plaintiff and appellant in satisfying the judgment hereinbefore referred to, out of the assets and property of the Water Company. That the pretended mechanics lien, if any, was not filed until March, 1915, and if valid at all, was subsequent and subject to the lien of the plaintiff and appellant upon the property of the Water Company obtained by the levy of the writ of attachment issued out of this court in the action in which the judgment herein sued on was recovered prior to the filing of the mechanics lien, and that the claims of the other defendants were also subsequent and subject to the lien of plantiff's judgment.

Separate answers were filed by the corporation defendants and by Stanford, as Receiver, but as they were identical in terms, only the answer of the corporation defendants is inserted in the transcript. This answer raises, by proper denials, the issue as to the validity of the bonds, asserting that they were pledged to secure the indebtedness due the corporation defendants, and that the Pondera Valley State

Bank, as Trustee in the mortgage to secure the bonds, had commenced a suit in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, to foreclose the mortgage for the benefit of the defendant corporations, which suit is pending, and to which the Pacific Coast Pipe Company is a party defendant. The answer did not set forth the date of the commencement of the suit, but on the trial it appeared to have been subsequent to the filing of the bill of complaint in this action, and that no summons had been served upon the Pacific Coast Pipe Company. The answer also attempted to set up complete jurisdiction in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton over the affairs of the Company, and thus oust the District Court of the United States for the District of Montana of jurisdiction to hear and determine the facts pleaded in the bill of complaint. (For Answer see Tr. pp. 19-35).

On the trial, in addition to the evidence relative to the organization of the Water Company, the issuance of the bonds and the proceedings by which they came into the hands of Bartley as Trustee, and their sale as collateral to the indebtedness due from the Water Company to the different corporations, there were introduced copies of the pleadings in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton. These consisted of the complaint in the action to foreclose the mechanics lien (Tr. pp. 62-80), the

complaint in intervention of the Pondera Valley State Bank, as Trustee (Tr. pp. 81-108), and the appearance of the Conrad City Water Company therein (Tr. p. 112). Attached to the answer of the Conrad City Water Company were the orders appointing the Receiver in the case of the Conrad Mercantile Company, March 16, 1915, (Tr. p. 37), the order appointing the Receiver in the case of Pondera Valley State Bank against Conrad City Water Company, June 23, 1915, (Tr. p. 40), and the order extending the receivership in the Mercantile Company case on June 23, 1915, (Tr. p. 46). For the purpose of establishing the date of the levy of the writ of attachment in the action upon which judgment was recovered, the return of the Marshall was introduced (Tr. p. 109), showing the levy on the 7th day of November, 1913.

After hearing the testimnoy, the court rendered its decision, (see Tr. pp. 117-121), in which it held that the allegations of the complaint with reference to the bonds were found to be true, that the plaintiff's attachment and judgment were entitled to priority over the bonds because the latter were invalid, having been issued and held to secure pre-existing debts in violation of the Constitution of the State of Montana, but that the levy of the attachment by filing notice with the Recorder of the County in which the real estate was situated, created but a lien for security to pay the judgment, and did not operate to bring the property of the Water Company into the custody of the court. That the pos-

session by the State Court of the property by virtue of the appointment of the Receiver gave to the State Court jurisdiction to hear and determine all controversies affecting title, possession and control of the property. Accordingly, the decree was entered dismissing the action for want of jurisdiction. From this decree the appeal is taken, assigning as errors the holding of the court below that the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton acquired exclusive jurisdiction to hear and determine all controversies affecting the title, possession and control of the property of the Water Company by reason of the proceedings set forth. (Tr. p. 123).

ARGUMENT.

The Court below, in his opinion (Tr. p. 119) lays down the correct rule for the determination of the question of jurisdiction, in the following words:

> "If this State Court receivership is void, if the receiver was appointed without jurisdiction, his possession would not be that of the State Court and would not affect jurisdiction herein."

NO JURISDICTION IN STATE COURT.

The complaint in the action of the Conrad Mercantile Company against the Conrad City Water Company sets forth a cause of action to foreclose a mechanics lien for $54.70, for materials and sup-

plies furnished, and prays for a judgment and order of sale. But in addition there are the allegations (Tr. p. 66) of the existence of the trust deed and that the company was unable from lack of means to carry on its business of supplying the inhabitants of the town of Conrad with water, and paying its debts, which are alleged to be about $96,000. Neither the trustee in the trust deed nor this plaintiff was made a party. Under the Statute of Montana the plaintiffs lien for the trivial amount of the cost of the materials ($54.70) was superior to the lien of the trust deed or any other lien, at least to the extent of the structure in which they were incorporated. Section 7295 Revised Codes provides as follows:

> "The liens attach to the buildings, structures or improvements for which they were furnished, or the work was done in preference to any prior lien, incumbrance or mortgage upon the land upon which said buildings, structures or improvements are erected; and any person enforcing such lien may sell the same under execution and the purchaser may remove the property sold within a reasonable time thereafter."

No facts are alleged as grounds for the appointment of a receiver to take possession of the entire assets of the Company, except the fact of insolvency. No allegations are made tending to show in what manner the subjection of the Water Company's property to pay a debt of $54.70 could interfere with its public duty of supplying water to the in-

habitants of the Town of Conrad, assuming that the lien claimant could have asserted such facts.

The Supreme Court of Montana has decided several times that the fact of insolvency of a corporation is not sufficient to justify the appointment of a receiver at the instance of a lien creditor, and that where no other ground is disclosed the proceedings are *void* and the appointment may be collaterally attacked.

The following language of the court in the case of *Berryman vs. Billings Mutual Heating Co., 44 517; 121 Pac. 280,* is interesting upon this point. (Quoting from 121 Pac. 283):

> "A Court of law has not any authority to appoint a receiver of property under attachment for the sole purpose of preserving the property and continuing the business of a defendant pendente lite. The function of a court of law is to subject the property attached to the payment of the plaintiff's claim as expeditiously and inexpensively as possible.
>
> "The fallacy of the notion that mere insolvency is sufficient to justify the appointment of a receiver is disclosed when we consider that an insolvent individual under the same circumstances, would have no such protection as that afforded the defendant in this case, or would be subjected to no such hardship, as the case may be. The result of that line of reasoning is that a receiver may be appointed because the defendant is a corporation. Our attention is called to the fact that the defendant consented to the appointment. Even so, such consent did

not confer jurisdiction. If a receiver can be appointed for an insolvent corporation by consent, one may also be appointed without consent and against the best interests of a corporation, whose officers, presumably familiar with its business, might, if unmolested, succeed in making it solvent. If a receiver may be appointed in an action to recover $5,000, one may also be appointed in a case involving $25, when, perchance, garnishment of a bank account or seizure of some small article of personal property would be amply sufficient to insure the payment of the plaintiff's claim. It would be a most dangerous doctrine to hold that a receiver can be appointed for a corporation in an action to recover a simple contract debt, merely because the defendant is insolvent.

"The fact, noted in some of the cases cited by the respondent, that, under our Code system of practice, law and equity are administered by the same court, is, in our judgment, entirely beside the question.

"In our opinion, the order appointing a receiver was a nullity and can be attacked collaterally. State ex rel. Jonston v. District Court, 21 Mont. 155; 53 Pac. 272, 69 Am. St. Rep. 645. See, also, Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; French Bank Case, 53 Cal. 495."

To the same effect are the following Montana cases:

State Ex rel Johnston vs. Dist. Court, 21 Mont. 155; 53 Pac. 272;

Forsell vs. Pittsburg & Mont. Co. 42 Mont. 412; 153 Pac. 479.

These decisions of the Supreme Court of Montana upon the question of the jurisdiction of the State Court to appoint receivers for insolvent corporations in aid of lien creditors was binding upon the District Court of the United States.

It was argued in the court below that if the proceedings in the case to foreclose the mechanics lien were without jurisdiction, the defect was cured by the intervention of the Pondera Valley State Bank and the assertion of the rights under the trust deed and the extension by the receivership to that case—and this view was accepted by the Trial Judge (Tr. p. 120). But this ignores the fact that the Pondera Valley State Bank did not intervene until June 23, 1915 (Tr. p. 115), which was after the commencement of this action on May 14, 1915, after the service of summons herein (see original summons) and but three days before the filing of the answer of the corporation defendants herein. Can a more flagrant effort to oust the Federal Court of jurisdiction to carry into effect its processes be conceived? The right of the mechanics lien claimant to a lien did not accrue until long after appellant's attachment lien had ripened into a judgment lien. Neither the appellant nor the Pondera Valley State Bank were made parties to the suit in which the Receiver was appointed. The only right the Receiver could assert in behalf of the mechanics lien claimant as

against this appellant would be the right to withold so much of the property as would satisfy the claim of the mechanics lien, which was prior to the lien of plaintiff's judgment if it was prior. The Pondera Valley State Bank, not having been made a party to the suit in the State Court until after the action at bar had been commenced could not date its rights back to the commencement of that acion. Even if the Federal Court had no jurisdiction over the Conrad Mercantile Company in asserting its claim secured by the mechanics lien, it did acquire jurisdiction to determine the controversy between appellant and those claiming under the trust deed, because the suit at bar was commenced first.

JURISDICTION OF FEDERAL COURT PRIOR IN POINT OF TIME.

The trial judge erred in holding that the levy of the plaintiff's attachment did not bring the property of the Water Company under the exclusive jurisdiction of the Federal Court, so as to enable it to enforce by proper proceedings the collection of the judgment afterwards rendered by it.

The issuance and levy of the writ of attachment in the suit to recover the judgment set up in the bill of complaint was sufficient to give this court jurisdiction of the affairs of the Conrad City Water Company, which jurisdiction could not be taken away from it by any proceedings of the State Court.

Beardslee v. Ingram, 148 N. Y. 411; 76 N. E. 476; 3 L. R. A. (N. S.) 1073.

It is immaterial whether the proceedings in which the receiver was appointed are void or not. The writ of attachment was issued and levied on the 7th day of November, 1913. The suit in which the receiver was appointed was not commenced until after the judgment had been obtained in this action, and in fact, after the writ of execution had been issued and levied. In the case of *Beardslee v Ingram* (Supra), we have almost an identical state of facts, except that the plaintiff in the attachment suit upon obtaining judgment, was proceeding to sell under his writ of execution. The receiver appointed in a suit commenced in the State Court after the attachment was levied, brought a suit to enjoin the Marshal from selling under the execution. The attachment was levied upon real estate in the same manner as in the case at bar. The only difference between the two cases is that in the *Beardslee v. Ingram* case the receiver, upon taking possession, brought suit to restrain the execution, whereas, in the suit at bar the plaintiff is seeking to compel the receiver to deliver up possession to the Marshall that the property may be sold under the process of this court, the lien of which dates back to the levy of the writ of attachment. The following language of the court is interesting:—

> "An injunction against a United States marshal, forbidding him from selling under an execution issued out of the circuit court of the United States, is in effect an injunction against

the Federal tribunal itself. Central Nat. Bank vs. Stevens, 169 U. S. 432, 463, 42 L. ed. 807, 818, 18 Sup. Ct. Rep. 403, and cases there cited. In that case a part of the decree of the state court under review sought to restrain the complainants in a suit in the United States circuit court from proceeding under the final decree of sale in the United States circuit court, and from enforcing the other remedies adjudged to them by that decree. The granting of this injunction was condemned as erroneous by the Supreme Court of the United States. 'The injunction,' said Mr. Justice Shiras, who wrote the opinion of the court, 'was a plain interference with the proceedings in another court which had full and complete jurisdiction over the parties and the subject-matter of the suit, and which jurisdiction had attached long before the suit in the supreme court (of the state) had begun.' State courts are expressly declared to be destitute of all power to restrain either the process or proceedings in the national courts. The general rule that there is no authority in the state courts to enjoin proceedings in the courts of the United States is laid down as distinctly as a judicial proposition can be declared, and the correctness of the conclusion finds ample support in the authorities cited. See Peck v. Jenness, 7 How 612, 624, 12 L. ed.. 841, 846; Riggs v. Johnson County (United States exrel. Riggs v. Johnson County) 6 Wall 166; 18 L. Ed. 768; 2 Story, Eq. Jur. Sec. 900; Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019. In the case last cited (which was a reversal of Re Schuyler's Steam Tow Boat Co., 136

N. P. 169, 20 L. R. A. 391, 32 N. E. 623) the question was whether it was within the power of a state court to restrain the libellants in a district court of the United States from prosecuting their libels, and the Chief Justice declared the general rule to be 'that state cannot enjoin proceedings in the courts of the United States,' and reviewed a large number of authorities sustaining that doctrine. Furthermore, it is 'a rule of general application that, where the property is in the actual possesion of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court,, Moran v. Sturges, 154 U. S. on page 274, 38 L. ed. on page 981 and 14 Sup. Ct. Rep. on page 1024. This proposition is stated by Chief Justice Fuller to have been repeatedly affirmed by the Supreme Court of the United States, and was perhaps most clearly and explicitly enunciated by Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355, in explaining the questions decided in Freeman v. Howe, 24 How. 450, 16 L. ed. 749. His language is as follows: 'The point of the decision in Freeman v. Howe supra, is that when property is taken and held under process mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purpose of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which

that jurisdiction is appointed to administer; that any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of property, while thus held by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.

"The attachment which Mr. Ingraham sued out in the circuit court of the United States antedated any proceedings in the suit in the supreme court of this state which resulted in the appointment of the receivers. Assuming that there was a sufficient and legal levy of this attachment by filing it in the office of the clerk of the United States circuit court for the western district of New York, such levy was effective to give to the Federal tribunal exclusive

jurisdiction of the property, which could not be disturbed by the state courts, if a levy of an attachment upon real estate brings the property to which it relates constructively into the custody of the tribunal out of which the warrant is issued. The proposition of law which appears to have led the courts below to sustain the injunction under review is that the levy of an attachment upon real estate gives to the court from which the process issues neither actual nor constructive possession of the property, and hence that the court has not acquired such custody of the property, by virtue of the attachment, as to prevent its lawful seizure by the receivers of another court. This doctrine finds support in a decision rendered in 1896, by a district judge of the United States, sitting alone in the circuit court for the southern district of California. Re Hall & S. Co., 73 Fed 527. It was adopted in order to uphold the title of receivers appointed by a Federal tribunal as against the claim under a levy of attachment issued out of the state court. The learned judge conceded that so far as personal property was concerned, taken by the sheriff under the levy of the attachment, his title was superior to that of the receiver; but he held that the same rule did not apply to real estate, inasmuch as the attachment gave only a lien upon the lands, without any apparent right to possession. I can see no logical reason for making an attachment under such circumstances effective to oust the jurisdiction of another court in the case of personal property, but ineffective to oust such jurisdiction in the case of real property. The

purpose of the law is the same in both cases,—to secure an appropriation of the attached property to the satisfaction of the plaintiff's claim in the event that he recovers judgment. I cannot find in the law of attachment anywhere any indication of an intent to make this remedy available to a plaintiff in case of personal property, so as to prevent its seizure by subsequent proceedings in another court, and to refuse the remedy in the case of real estate. No such intent can be reasonably inferred from the fact that the officer executing the process is not required or permitted to take actual possession of the land. By procuring the notice of attachment to be filed in the prescribed office the plaintiff has done what the law requires to entitle him to have the land applied to the satisfaction of the judgment, if he subsequently obtains a judgment. He accomplishes no more than this with reference to personal property, by the actual seizure of personal property under the levy of an attachment thereon; and it seems to me that, so far as any question of jurisdiction is concerned, the real estate, upon which an attachment has been levied, issued out of a Federal court, should be deemed to be constructively in the custody of that court for the purposes of the rule laid down by the Supreme Court of the United States in Central National Bank v. Stevens, Moran v. Sturges, and the other cases which have been cited.

"In addition to Re Hall & S. Co., supra, the courts below seem to have relied largely on Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322. In

that case there was an attempt by the plaintiff in ejectment to obtain possession of land under judgments of the circuit court of the United States, entered in 1840. There were levies by execution on these judgments in February and April, 1845, a sale under execution, and a deed executed to the purchase in August, 1845. The defense was based on a deed given on a sale of the land in 1847 by a receiver of the Alabama court of chancery, who had been in possession of the property since June 27, 1845, by virtue of a decree rendered in April, 1845, in a suit begun in 1843. While the judgments under which the plaintiff claimed were prior to the institution of the chancery suit in 1843, the levy under them was subsequent to the filing of the bill in the chancery suit, but prior to the appointment of the receiver. The Supreme Court of the United States held that the plaintiff in ejectment had obtained no title inasmuch as at the time of the sale under the executions the Alabama court of chancery was in possession of the premises by its receiver. The view of the court seems to have been that the appointment of the receiver related back to the time of the filing of the bill in the chancery suit, which was prior to the levy of the executions under the plaintiff's judgments. While this case seems to support to some extent the position of the respondents, the case at bar is distinguishable from it in one respect which seems to me essential. Here there was no filing of any bill in the suit in which the receivers were appointed by the state court before the levy of the attachment in the suit of Mr. Ingraham in the United States circuit

court. The action was not begun until long after the attachment had issued out of the Federal court. If in Wiswall v. Sampson it had appeared that the levy of the judgments obtained in the Federal court had been prior to the filing of the bill under which the receiver was appointed by the state court, it seems to me that it would hardly have been held that such levy was interrupted by the filing of the bill and the appointment of the receiver. The basis of the decision in Wiswall v. Sampson seems to have been that in a suit of such a nature as that in which the receiver was appointed by the Alabama court of chancery (a suit to set aside conveyances of land as fraudulent), jurisdiction attached at the time of the filing of the bill, and hence remained paramount in the state court until decree. The doctrine involved was the same as that asserted in Farmers' Loan & T. Co. v. Lake Street Elev. R. Co., 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564, where it was held that the filing of the bill in a mortgage foreclosure suit in the circuit court of the United States disabled an Illinois state court from proceeding with a suit instituted therein to prevent the foreclosure of the mortgage, in which suit the summons was served before the writ of subpoena in the Federal court, although not until after the bill therein had been filed. 'As between the immediate parties,' said the court, 'in a proceeding in rem, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served, in accordance with the rules of practice of the

court.' Referring to the rule that the possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like powers, Mr. Justice Shires observed: 'Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.'

"If the view which has been taken of the scope and effect of the decision in Wiswall v. Sampson be correct, that case is not an authority in favor of the respondents. It may be noted that this court, in Chautauqua County Bank v. Risley, 19 N. Y. 369, 376, 377, 75 Am. Dec. 347, refused to follow it, if construed as denying the validity of a title acquired by sale under a judgment which was a legal lien upon the land sold prior and paramount to the title or possession of a receiver. In the opinion of the learned appellate division it is said that the doctrine of the Chautauqua County Bank Case in this respect was repudiated in Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65, but I can find no reference in the opinion therein to the

former case. Although, in Walling v. Miller, this court did hold that a sale of property made under an execution, without leave of the court, while the property was in the possession of a receiver, was illegal and void notwithstanding that the execution had been levied before the appointment of the receiver, the question presented here, whether proceedings under an execution relating back to an attachment levied before the appointment of receivers can be restrained by an equity suit subsequently instituted in another tribunal, was not involved or decided."

Inasmuch as the jurisdiction over the property of the Water Company was obtained by levy of the writ of attachment, the Federal Court retained exclusive jurisdiction to subject the property of the Water Company to the payment of the judgment. The complaint alleged and the answer admitted that the entire plant of the company was a unit and that to sever the real estate from the personalty would be injurious to the property. The levy of the writ of attachment upon the real estate was therefore a sufficient taking by this court to grant it jurisdiction as against the receiver appointed either in the action to foreclose the mechanics lien or in the action to foreclose the deed of trust.

See also, *Southern Bank & Trust Co. v. Folsom, 75 Fed. 931.*

Cooper v. Reynolds, 10 Wall 308;
Buck v. Colbath, 3 Wall 334.

or
of

the Water Company by the levy of the writ of attachment, the action at bar is a proceeding in rem, and at the time of the service of summons herein neither the Pondera Valley State Bank as Trustee, nor any of the creditor corporations had been brought under the jurisdiction of the StateCourt. The jurisdiction of the State Court could cover only the controversy then pending before it. This court by reason of the diversity of citizenship has jurisdiction as between appellant and the Pondera Valley State Bank, and those whom it represents, to try the validity of the bonds as against appellant's judgment lien.

The trial court has held that the deed of Trust, and the issue of bond were void as against the lien of the plaintiff's judgment. If the action of the trial court is to be affirmed, it will result in surrendering the possession of the property into the hands of parties, one of whom is asserting claims which are decreed to be void as against the plaintiff, and the other of whom has a claim for but $54.70, which if it is a lien at all, can be satisfied by taking an infinitesimal part of the property in controversy and as to which it has a prior lien, if lien at all, to all of the parties between whom the real controversy exists. The rights of the party can be fully protected by a decree requiring the plaintiff to pay off the claim secured by the mechanics lien as a condition of the decree in its favor. We submit that the court below erred in holding that it had no jurisdiction, and that the order appealed from should be

reversed with directions to enter a proper decree in favor of appellant.

Respectfully submitted,

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